Supreme Court United States.

DECEMBER TERM, 1872.

THE NATIONAL BANK OF THE METROPOLIS,
PLAINTIFF IN ERROR,

vs

JAMES C. KENNEDY, Receiver, &c.,
DEFENDANT IN ERROR.

No. 37.

ERROR TO THE SUPREME COURT OF DISTRICT OF COLUMBIA.

BRIEF OF PLAINTIFF IN ERROR.

McGILL & WITHEROW, PRINTERS AND STEREOTYPERS, WASHINGTON, D. C.

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vs.

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STATEMENT OF THE CASE.

The Defendant in Error, being Plaintiff below, brought suit in his own name, as Receiver of the Merchants' National Bank of Washington, against the National Bank of the Metropolis, Plaintiff in Error, to recover the sum of $20,000, being parcel of a certain check for $50,000, drawn by H. L. Robinson, Assistant Quartermaster of the United States, upon the National Bank of the Metropolis, in favor of the Merchants' National Bank, on May 1, 1866.

The Plaintiff admitted that $30,000 had been paid upon this check. The only controversey was in regard to the balance. And the defense was thus: On the 25th or 26th of February, 1866, the Defendant's evidence tended to prove, Charles A. Sherman, Cashier of Plaintiff's Bank, came to the banking house of the Defendant, in this city, and requested, on behalf of his Bank, a loan of $20,000 for 60 or 90 days, upon 200 shares of the stock of his Bank, then above par, as collateral security. Mr. J. B. Hutchinson,

Defendant's Cashier, finally consented to accommodate the other Bank, by making a call loan upon such security; and on the 27th February Sherman applied to him for the money. Some conversation then occurred as to how his Bank would have the money. Sherman agreeing to take drafts or checks, drawn by the Defendant, upon Baltimore and Philadelphia, Mr. Frissell, the Assistant Cashier of Defendant, signed and delivered to Sherman two drafts or checks, each for $10,000, upon the Farmers and Merchants' National Bank of Baltimore and the Central National Bank of Philadelphia, payable "*to the order of C. A. Sherman, Esq., Cashier.*"

The drafts were as follows:

No. 347. *National Bank of the Metropolis,*
Washington, D. C., Febr'y 27, 1866.

Pay to the order of C. A. Sherman, Esq., Cashier, ten thousand dollars. *A. L. Frissell,*
A. Cashier.

To Farmers & Merchants' Nat. Bank,
$10,000. *Baltimore, Md.*

National Bank of the Metropolis,
Washington, D. C., Febr'y 27, 1866.

Pay to the order of C. A. Sherman, Esq., Cashier, ten thousand $\frac{10}{100}$ *dollars.* *A. L. Frissell,*
To Central Nat'l Bank, *A. Cashier.*
Philadelphia.

A memorandum note for $20,000, signed by Sherman, and a certificate, in the name of L. English, for 200 shares of the stock of the Merchants' National Bank, were handed by Sherman to Hutchinson; and the drafts just mentioned were taken away by Sherman.

It appeared that upon the execution of this memorandum note by Sherman, it was handed at once to one of the clerks of Defendant, and it was not observed that Sherman had omitted to add to his signature the usual scratch indicating "Cashier," and that this omission was not discovered until the time of the transaction out of which this suit arises, two months afterwards.

On the 1st of May, 1866, the check drawn by Robinson, in favor of Plaintiff's Bank, upon the Defendant, was presented at Defendant's banking house by a runner of Plaintiff's Bank for payment. Mr. Frissell delivered to him in payment certain currency and evidences of debt, including this memorandum note, and the certificate of stock, in the name of English, deposited as security for the repayment of the loan of $20,000, made on February 27th, as Defendant believed, to the Plaintiff's Bank.

A controversy then arose with regard to the nature and character of the transaction of the previous February. Sherman alleged that he borrowed the $20,000 on his own account, and not on account of his Bank. The Defendant's officers insisted that the loan was to the Merchants' National Bank; that the amount was properly deducted from the Robinson check; and that the Defendant had a right to return, and that Plaintiff's Bank was bound to receive, the memorandum note and certificate of stock delivered to the runner.

The result was that the note and stock remained in the possession of the Plaintiff's Bank.

Defendant's Statement of Evidence, Rec., p. 18.

On the day after the Robinson check was presented and paid, as stated, to wit, the 2d of May, 1866, the Defendant's evidence tended to show, Mr. Huyck, President of the Plaintiff's Bank, sought an interview with Hutchinson, Defendant's Cashier, on the subject of this difference between the Banks. The result was, that Huyck acquiesced in and accepted the payment of the Robinson check in part by the note and stock delivered to his Bank; and stating that his Bank was subjected to inconvenience for want of currency, requested Hutchinson to make the Plaintiff's Bank a new loan of $20,000 upon the same stock as collateral. Hutchinson refused to make such loan, but consented to make, and did make a new call loan of $10,000, taking as collateral sundry notes and bills discounted by Plaintiff's Bank. This loan was afterwards repaid to the Defend-

ant. The note and certificate of stock above referred to were retained by the Plaintiff's Bank. That Bank never repudiated these acts and declarations of its President; and they were accepted by the Defendant, through its Cashier, in good faith, as an adjustment of the difference in regard to the transaction of February, 1866, and the payment of the Robinson check.

Defendant's Statement of Evidence, p. 19.

The evidence showed that the two hundred shares of the capital stock of the Plaintiff's Bank, represented by the certificate in the name of English, and deposited with the Defendant as collateral on February 27, were purchased with the two drafts drawn to the order of Sherman, as Cashier, and delivered to him by the Defendant.

At the interview between Huyck and Hutchinson above mentioned, on May 2, the testimony was, Huyck admitted, that, though the loan was originally intended for the benefit of his Bank, Sherman afterwards concluded to purchase, on his own account, the stock in the name of English. (Rec., p. 19.) Hutchinson stated, however, that he knew nothing of such change of intention after the loan was made. (*Ibid.*)

On January 7, 1867, Plaintiff, as receiver, brought this suit to recover the balance he alleged to be due upon the Robinson check.

The defense on the merits was accordingly two-fold: 1. That at the time the Robinson check was presented, the Plaintiff's Bank was indebted to the Defendant in the sum of $20,000, for money loaned, and the Defendant had a right to deduct that amount from such check, and tender the note and stock referred to in part payment of that check; 2. That by valid agreement between the Banks, the matter in controversy between them had been settled and adjusted, and the present demand satisfied, prior to the institution of this suit.

Verdict for the Plaintiff. In general term, the court being equally divided, judgment on the verdict. (Rec., p.

31.) On the trial the defendant excepted to the admission of certain evidence offered by Plaintiff; to the refusal of the court to grant certain prayers for instruction to the jury; and to certain instructions given at the instance of Plaintiff; and these exceptions are duly presented in the record, and are here for consideration and decision.

ASSIGNMENT OF ERRORS RELIED ON.

I. The Court erred in entering judgment for the Plaintiff upon the verdict, as the declaration failed to aver that the suit was authorized and directed by the Comptroller of the Currency, and thus showed no right of action in the Plaintiff.

II. The Court erred in refusing to instruct the jury, that the Plaintiff is not entitled to recover in this action in his right as Receiver. (6th Bill of Excep., Rec., p. 13.)

III. The Court erred in admitting in evidence the conversation that took place between Sherman and Hutchinson, in regard to the form of the drafts referred to, at the time the drafts were about to be drawn, and permitting the witness, Sherman, to state the reason for the form of the drafts. (1st Bill of Excep., Rec., p. 9.)

IV. The Court erred in allowing the witness, Sherman, to testify as to what was said by Huyck at the time he handed the certificate of stock to him, Sherman, touching the sale, delivery, and price of the stock. (2d Bill of Excep., Rec., p. 10.)

V. The Court erred in allowing the witness, Sherman, to state for what purpose the drafts referred to were delivered to English by Huyck. (3d Bill of Excep., Rec., p. 11.)

VI. The Court erred in allowing the witness. Sherman, to state the reason why said drafts were not indorsed when they were given to said English. (4th Bill of Excep., Rec., p. 11.)

VII. The Court erred in granting the Plaintiff's *first prayer* for instruction, to wit, that "if the jury find from the evidence aforesaid that the note of Charles A. Sherman was passed to and received by the Defendant as the evidence

of money or negotiable drafts lent to him, and that the sole consideration on which said loan was made was the personal responsibility of said Sherman on said note, and the two hundred shares of stock in the National Merchants' Bank, pledged by him to the Defendant as collateral security for said loan, then the said Merchants' Bank was in no way chargeable with said note, nor could the same be legally tendered to them by the Defendant, as part payment of the check of Robinson, unless the jury shall find from the evidence that said loan was really made to said Sherman in behalf of said Merchants' Bank, and the proceeds thereof went to the use and benefit of said Bank." (5th Bill of Excep., Rec., p. 12.)

VIII. The Court erred in refusing the instruction set out at large in the Defendant's 7*th Bill of Exception*, as prayed for by the Defendant, to the effect that if the Defendant, in good faith, believing that the loan was for the Plaintiff's Bank, drew the two drafts referred to in favor of Sherman, as Cashier, and subsequently deducted the amount thereof from the Robinson check; and a difference thereupon arising between the two Banks with regard to the nature of this transaction of loan, and the right of the Defendant to make such deduction, if the President of the Plaintiff's Bank acquiesced in and accepted the part payment of said Robinson check by said loan, and declared that said payment as made should stand, and adjusted said difference, and thereupon requested a new loan from the Defendant, which was made, as stated in said prayer, and if the Plaintiff's Bank did not afterwards repudiate the action of its President, but accepted the new loan, and retained in its possession the note and certificate of stock deposited by Sherman with the Defendant when said loan of $20,000 was made, the adjustment and settlement so made by the President of the Plaintiff's Bank was binding upon that Bank. (7th Bill of Excep., Rec., pp. 13, 14.)

IX. The Court erred in refusing to give the instruction set out in the 8th *Bill of Exception*, as prayed for by the Defendant. (8th Bill of Excep., Rec. pp. 14, 15.)

X. The Court erred in refusing to give the 4th instruction set out in the 10th Bill of Exceptions, as prayed for by the Defendant, to the effect that the Plaintiff could not recover unless the jury found that, before suit brought, the note of Sherman and the 200 shares of stock were tendered by the Merchants' National Bank, or its Receiver, to the Defendant. (10th Bill of Excep., 4th Prayer, Rec., p. 17.)

XI. The Court erred in refusing to give the 5th instruction reported at large in the 10th Bill of Exception, as prayed for by Defendant, to the effect that if the jury found that, prior to February, 1866, the Plaintiff's Bank had been in the habit of borrowing of the Defendant, through Sherman, as Cashier, and repaying the money, and that the loan in question was made to Sherman, as the Defendant believed, for the benefit of the Plaintiff's Bank, that Bank was liable therefor, and the Plaintiff could not recover. (10th Bill of Excep., 5th Prayer, Rec., p. 17.)

XII. The Court erred in refusing to give the 6th instruction, reported at large in the 10th Bill of Exception, as prayed for by the Defendant, to the effect that the Plaintiff could not recover if the jury found that, after the protestations and tender in said prayer mentioned, the President of the Plaintiff's Bank agreed to retain the note of Sherman and the stock referred to as a payment on said Robinson check, and did retain them. (10th Bill of Excep., 6th Prayer, Rec., p. 17.)

BRIEF OF ARGUMENT.

FIRST.

The Plaintiff was not entitled to bring suit without the authority or direction of the Comptroller of the Currency; and the declaration, failing to aver such authority or direction, was defective. The Court below, therefore, erred in entering judgment for the Plaintiff, and that judgment should be now reversed.

1. This proposition, we apprehend is, in effect, adjudged by the case of *Kennedy* v. *Gibson*, (8 Wallace, 505,) and the

following passage from the Opinion of Mr. Justice Swayne, in that case:

"The Receiver is the *instrument* of the Comptroller. He is appointed by the Comptroller, and the power of appointment carries with it the power of removal. It is for the Comptroller to decide whether it is necessary to institute proceedings against the stockholders to enforce their personal liability, and whether the whole or any part, and if only a part how much, shall be collected? These questions are referred to his judgment and discretion, and his determination is conclusive. The stockholders cannot controvert it. It is not to be questioned in the litigation that may ensue. He may make it at such time as he may deem proper, and upon such data as shall be satisfactory to him.

"This action on his part is indispensable, whenever the personal liability of the stockholders is sought to be enforced, and must precede the institution of suit by the Receiver.

"*The fact must be distinctly averred in all such cases, and, if put in issue, must be proved.*"

It is true the Court were there speaking of suits to enforce the individual liability of the stockholders. But it will be perceived that the 50th section of the act of June 3, 1864, (*infra*,) expressly provides, that *all* the authority therein conferred upon the Receiver shall be exercised "under the direction of the Comptroller." (13 Stats., 102.) As Mr. Justice Swayne says, he is "the *instrument* of the Comptroller."

A receiver appointed by a Court of Chancery must apply for special leave of the court in order to bring and defend suits, and generally to do such acts as may be beneficial to the estate. (Jeremy's Eq., B. 1, ch. 7, sec. 1; 2 Story's Equity, sec. 833.) This court, in *Booth* v. *Clark*, (17 How., 332,) examined at length the character and authority of such receivers; and there said, "he is an officer of the court; his appointment is provisional. He is appointed in behalf of all parties, and not of the complainant or defendant only.

It is the court itself which has the care of the property in dispute. *The receiver is the creature of the court.*"

The court then proceed to say: "Whether appointed, as this receiver was, under the statute of New York, or under the rules and practice of chancery, his official relations to the court are the same. A *statute appointment* neither enlarges nor diminishes the limitation upon his action. His responsibilities are unaltered. Under either kind of appointment, he has at most only a *passive capacity* in the most important part of what it may be necessary for him to do, until it has been called, by the direction of the court, into ability to act." (17 How., 338.)

These doctrines are entirely applicable to the receivership under the National Banking Act of 1864. The Receiver, appointed by the Comptroller under that act, is the instrument, agent, or creature of the Comptroller, and he is no more able to sue for the property or *choses in action* belonging to the bank, without the direction of the officer from whom his appointment is derived, than a receiver in chancery is capable of exercising similar authority without the special leave of the court whose creature he is. And in every case the fact of such authority, in the language of this court, *must be distinctly averred, and, if put in issue, must be proved.*

The declaration in this case contains no such averment; and is, therefore, fatally defective. (Record, pp. 1, 2.)

2. The defects in the declaration are before the court for consideration. The assignment of errors is not limited to the Bill of Exceptions, but may embrace any error which appears on the face of the record.

Woodward *v.* Brown, 13 Pet., 5.
Suydam *v.* Williamson, 20 How., 433.

SECOND.

The suit is improperly brought in the name of the Receiver.

The question, whether the Receiver may sue in his own name, is presented by the second assignment of errors, and the 6th Bill of Exception. (Rec., p. 19.)

We submit that suits upon *choses in action* should be instituted in the name of the Bank, to the use of the Receiver.

The Plaintiff's rights as Receiver are created and defined by the 50th section of the act of Congress of June 3, 1864, (13 Stats., p. 102,) in the following words:

"On becoming satisfied, as specified in this act, that any association has refused to pay its circulating notes, as therein mentioned, and is in default, the Comptroller of the Currency may forthwith appoint a receiver, and require of him such bond and security as he shall deem proper, who, *under the direction of the Comptroller*, shall take possession of the books, records, and assets, of every description, of such association, collect all debts, dues, and claims belonging to such association; and, upon the order of a court of record of competent jurisdiction, may sell or compound all bad or doubtful debts, and, on like order, sell all the real and personal property of such association, on such terms as the court shall direct; and may, if necessary to pay the debts of such association, enforce the individual liability of the stockholders provided for in the 12th section of this act; and such receiver shall pay over all money so made to the Treasurer of the United States, subject to the order of the Comptroller of the Currency, and also make report to the Comptroller of the Currency of all his acts and proceedings."

The provisions quoted (and there are no others in the statute relating to the rights of receivers) certainly confer no authority on the Receiver to bring a suit in his own name. The rule seems to be that, in the absence of distinct and express statutory authority, the action brought must be in the name of the person between whom and the person sued there is privity of contract.

O. and M. R. R. Co. *v.* J. C. R. R. Co., 14 American Law Register, 733.
Yeager *v.* Wallace, 44 Penn., 294.
Green *v.* Winter, 1 Johns. Ch. Rep., 66.
Parker *v.* Browning, 8 Paige, 338.
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The statutes of New York and Massachusetts, from which the National Banking Act is derived, contain express provisions authorizing the Receiver to sue in his own name.

The question here presented was not raised or considered in *Kennedy* v. *Gibson*, (*supra.*)

There is, however, a difference between the claims sought to be enforced in the two cases. A suit in equity to enforce stockholders' personal liability stands on a different footing, with respect to the right of action on the part of the receiver, from actions at law to recover property in possession or in action vested in the Bank. In the first place, an assignee of a *chose in action* may sue in equity in his own name; but generally he must sue at law in the name of his assignor. And, in the second place, the amount due from the stockholders may be said to accrue to the receiver in his own right, for the purpose of suit, whereas his interest in debts due the bank accrues to him in the right of the bank in whom the legal title continues always to be vested.

THIRD.

The conversation between Sherman and Hutchinson, at the time the drafts or checks were about to be drawn, in regard to the form of the drafts, and Sherman's testimony as to the reason for the form of the drafts, were not competent evidence. (3d Assignment of Error; 1st Bill of Exception, Rec., p. 9.)

1. The Plaintiff called Shermen to prove that he had borrowed this money on his own account, and not as agent of the Bank.

The drafts, when produced, showed that they were payable to him in his official capacity, and that they were indorsed by him in that capacity. (Rec., pp. 8, 9.) The testimony also was, that the proceds of them went to the credit of the Plaintiff's Bank. The next step on the part of the Plaintiff was an offer to prove by Sherman the conversation which took place between him and Hutchinson, Defendant's Cashier, in regard to the form of the drafts, when they were about to be drawn. Against the objection of Defendant, the witness was permitted to state that con-

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versation, and also the reason why the drafts were made payable to him in his official capacity. (Rec., p. 9.)

2. The object of this evidence was to strike out from the body of the drafts and the indorsements the word "*Cashier*," and explain the alleged motive for the use of the term of official designation in the instruments; and thus vary or contradict and qualify the writings by parol testimony. We submit that the evidence was inadmissible.

(*a*) It may be regarded now as well-settled doctrine, that a note, bill, or check, payable to a person as cashier of a moneyed corporation, is, in judgment of law, payable to the corporation of which he is the officer; and that a note, bill, or other negotiable instrument, made or indorsed by a person, as cashier of such a corporation, is executed or indorsed, in judgment of law, by the corporation, and not the cashier; and that the officer can only be held personally liable upon its appearing that he was not authorized.

Extrinsic evidence may be introduced when the name of the corporation does not appear in connection with the word of official style, to connect the officer with the corporation, and such evidence may be admissible on the question of the *authority* of the officer; but we submit that parol evidence is in no case admissible to show the *intention* of the parties to the contract; certainly in no case, when neither fraud nor mistake nor accident is alleged. This principle is well stated by the Supreme Court of Iowa, in *Harkins* v. *Edwards*, (1 Iowa, 431.)

The main proposition, that a negotiable instrument, payable to an individual as cashier, is, in judgment of law, payable to the Bank of which he is the officer, is adjudged by the following cases:

Bank of N. Y. *v.* Bank of Ohio, 29 N. Y., 619.
Bank of Genesee *v.* Patchin Bank, 19 N. Y., 309.
Babcock *v.* Beman, 1 Kernan, 200.
Shaver *v.* Ocean Mining Co., 21 Cal., 45.
Farmers' and M. Bank *v.* Troy City B., 1 Douglas, 458.
Tremont Bank *v.* Paine, 28 Vt., 24.
Baldwin *v.* Bank of Newbury, 1 Wallace, 239.

The Plaintiff did not deny that Sherman had authority to borrow this money. The object of the parol evidence was to show simply that he did not *intend* to receive the checks, drawn and payable to him in his official capacity, on behalf of the Bank. There was no ambiguity, latent or patent, to be explained; no mistake or accident was alleged; and no fraud pretended. The checks speak for themselves. They were intended to be just what they are. In *law* they are payable to the Bank, and evidence the payment of so much money to the *Bank*. Suppose they had been *expressly* payable to the "*Merchants' Bank;*" would it be competent to show, by extrinsic parol evidence, that they were not intended to be so drawn, or that they were intended to be payable to the agent in his private capacity, or prove conversations between the agents of the Banks, previous to or after the consummation of them? Clearly not. It is well settled, that a party sued on an instrument, which purports on its face to be made by him as *principal*, cannot show by parol that he acted as *agent* for a third person with the knowledge of the other. (Higgins *v.* Senior, 8 Mee. & Wels., 844; Jones *v.* Littledale, 6 A. & E., 48; Ford *v.* Williams, 21 How., 289.)

Certainly, then, this Bank cannot introduce parol evidence, for the purpose of substituting, by means of anterior conversations, another contract for that which the instruments show was in fact and in form, and intended to be, concluded, or for the purpose of creating other instruments different from those which were in fact drawn and delivered to the Plaintiff, and intended so to be. We take it further to be clear that, where an agent makes a written contract, and on its face professes to act as agent for another, and there is no ambiguity, the principal cannot, in an action on such contract by the other party, prove by parol that the agent *intended* to contract on his own behalf, and not on behalf of the principal, for whom he actually contracted, with the knowledge of the plaintiff. The matter of the agent's *authority* is another thing.

Parol evidence is admissible to introduce a *new* party, but never to *discharge* an apparent party to the contract. (8

Mees & Wells, p. 844.) It is not competent to a party who appears on the face of an instrument to be principal, to show that he is merely a surety. (Prince *v.* Edwards, 10 B. & C., 578.) And in *Trueman* v *Loder*, (11 A. & E., 589,) Lord Denman held, that where a person was known to have been an agent for the defendant, and as such had always used his own name to bind the defendant, it was not competent for the defendant to show that a particular contract was intended to be made by such person on his own account, the plaintiff having no knowledge that his authority to act as agent had terminated.

Lord Denman, in that case, well said, that the signature of a duly authorized agent to a writing is as much the signature of the principal as if the principal had subscribed the instrument himself.

(*b*) This court has adhered to the landmarks of the law on this subject of parol evidence to vary written instruments.

In *Grant* v. *Naylor*, (4 Cranch, 224,) a letter of credit to John and *Joseph* Naylor & Co. was held not to support an action by John and *Jeremiah* Naylor & Co., and plaintiff was not allowed to prove by parol that the letter was *intended* to be addressed to the latter firm, and that the variance arose from mistake. Ch. J. Marshall said, the principle "which will not permit a written contract to be explained by parol originates in a general and wise policy, which this court can not relax, so far as to except from its operation cases within its principle." In that case the court said, there was no *ambiguity*, no *fraud*, and no *mistake* to be rectified, as there is none here.

In *Dunlop* v. *Monroe*, (7 C., 242,) the court held parol evidence to prove that one set of instructions superseded another inadmissible.

In *Hunt* v. *Rousmanier's Adm.*, (8 Wh., 174,) Ch. J. Marshall said: "It is a general rule, that an agreement in writing, or an *instrument carrying an agreement into execution*, shall not be varied by parol testimony, stating conversations or circumstances *anterior* to the written instrument."

In *Sprigg* v. *Bank of Mt. Pleasant*, (14 Pet., 206,) it was held, that a principal debtor in a bond could not show that he was merely a surety.

In *Bank of United States* v. *Dunn*, (6 Pet., 51,) an indorser was held incompetent to prove, that when a prior indorser put his name on the note he did so under a representation that sufficient stock to secure payment had been pledged by maker, and that his liability was merely nominal. "The facts stated by the witness are in direct contradiction to the obligation implied from the indorsement of the defendant."

In *Van Buren* v. *Digges*, (11 H., 461,) it was held that extraneous evidence was inadmissible to prove that a clause in a written contract, providing for a forfeiture of a fixed sum in case of default, was intended to liquidate the damages.

In *Garrison* v. *Memphis Ins. Co.*, (19 H., 316) it was said, "although it is competent to explain by parol what is ambiguous, and to introduce what is omitted, because sanctioned by usage, it is not competent to vary or contradict the terms of the contract."

In *Brown* v *Wiley*, (20 How., 447,) the drawer of a bill was not permitted to prove by parol an agreement with payee that the bill should not be presented till after another bill accepted by drawer had been provided for. Mr. Justice Grier there said:

"When the operation of a contract is clearly settled by general principles of law, it is to be taken to be the true sense of the contracting parties. This is not only a positive rule of the common law, but it is a general principle in the construction of contracts. Some precedents to the contrary may be found in some of our States, originating in hard cases; but they are generally overruled by the same tribunals from which they emanated, on experience of the evil consequences flowing from a relaxation of the rule."

In *Ford* v. *Williams*, (21 How., 289,) the court said that the agent who binds himself, will not be allowed to con-

tradict the writing by proving that he was contracting only as agent.

In *Insurance Co.* v. *Wilkinson*, (13 Wall., 230,) Mr. Justice Miller, in a forcible opinion, expounds the philosophy and scope of this rule of evidence; and where fraud, mistake, or accident does not supervene, recognizes its binding force as a rule of justice.

(*c*) We submit, therefore, that in the absence of proof of fraud or mistake, or allegation of either, it was incompetent for the plaintiff to contradict or vary the instruments, which were the evidence, in whole or in part, of the transaction, by the conversation given in evidence.

FOURTH.

The Court erred in admitting in evidence the declarations of Huyck, touching the sale, delivery, and price of the stock, out of the presence of Defendant and its agents, reported in the 2d Bill of Exception, (Rec., p. 10;) and also in allowing Sherman to state the purpose for which the drafts were delivered by Huyck to English, as mentioned in the 3d Bill of Exception, (Rec., p. 11;) and further, in admitting the testimony of Sherman, as to the reason why the said drafts were not indorsed when they were delivered to English, as contained in the 4th Bill of Exception. (Rec., p. 11.)

These errors are the subjects of the 4th, 5th, and 6th assignments of error, and may be briefly considered together.

Sherman testified that the two hundred shares belonging to English, which were subsequently deposited with Defendant as collateral, were in the hands of Huyck for sale; and that the certificate was handed to him by Huyck. He said that after he received the drafts he went to the Bank and delivered them to Huyck, the President of the Bank, and that Huyck afterwards delivered them to English. He also testified that the drafts were not indorsed by him when they were given to English.

We submit that Huyck's declarations, referred to in the 2d Bill of Exception, when he handed Sherman the certifi-

cate, were incompetent and irrelevant evidence. Incompetent, because they were made by Huyck, as agent of English, out of the hearing of Defendant's agents, and in relation to a matter in which the Defendant had no concern. Huyck, as agent of English, was a stranger to the Defendant, and the Defendant was a stranger to the transaction between English and the Merchants' Bank. *Res inter alios acta alteri nocere non debet.*

The evidence was irrelevant, because it mattered not why or wherefore English sold the stock. The fact of the sale was the only fact that could possibly have any relevancy to this issue.

The rest of the evidence to which exception was taken, and included in the 3d and 4th Bills of Exception, would seem to be incompetent for the same general reason. It is not easy to see how Sherman could be supposed competent to testify to the purpose for which the drafts were delivered by Huyck to English. The fact that they were so delivered, and the further fact that they were not indorsed when they were given to English, were the only circumstances to which inquiry could properly extend on this trial.

FIFTH.

The Court erred in granting the Plaintiff's first prayer, reported in the 5th Bill of Exception.

The question as to the correctness of this instruction is raised by the 7th assignment of error.

The Court granted this prayer, subject to any qualification in the first prayer granted the Defendant. But nothing in the Defendant's prayer qualifies the law as laid down in this instruction. (See Record, p. 16.) The inquiry, then, is, whether the instruction, in the terms of this prayer, was correct? And we submit it was not.

As we understand this charge, the Court told the jury that the Plaintiff's Bank was not liable for the money loaned, if credit was given exclusively to Sherman, unless the jury found (1) that the proceeds went to the use of the

Bank; (2) that the Defendant loaned the money to Sherman on behalf of his Bank. And the meaning of this we apprehend to be, that the Plaintiff's Bank is not liable for the consideration received, unless the Defendant *knew*, at the time, that Sherman borrowed the money on behalf of his Bank, if Defendant gave credit exclusively to Sherman. The phrase in the charge is, "*unless the jury shall find from the evidence that said loan was really made to said Sherman in behalf of the Merchants' Bank.*" (Rec., p. 12.) The liability is made, then, to depend upon the knowledge of Defendant that Sherman was acting as agent for the Bank in that transaction; for of course it cannot be said that Defendant really made the loan to Sherman on behalf of the Bank, unless it knew that he was acting for the Bank.

Our view of the law is, that if Sherman did not disclose the fact that he was acting for the Bank, the Bank is liable, unquestionably, if it received the consideration, notwithstanding credit was given expressly and exclusively to Sherman.

We suppose the law to be well settled, that a contract made by an agent, on behalf of an undiscovered principal, may be enforced against the latter subsequently in the same manner and with the same force and effect as if he had been named as a party to the contract in the first instance, notwithstanding the credit of the agent was the sole foundation of the transaction.

Paterson *v.* Gandesequi, 15 East, 62.
Raymond *v.* Crown and Eagle Mills, 2 Met., 319.
Thompson *v.* Davenport, 9 B. & C., 78.

This liability of an undisclosed principal exists in all cases of considerations executed for the benefit of the principal, from which liability in general assumpsit is raised by law.

If a partner obtain money on his own account for the use of the firm, without disclosing the interest of the firm, the debt is that of the firm, although the note of the partner may have been taken by the creditor.

Tucker *v.* Peaslee, 36 N. H., 176.

An unknown principal has been said to be liable, when discovered, upon all *express* contracts, verbal or written, entered into by his agent, in his own name, as principal.

Beckham *v.* Drake, 9 Mees. & Wels., 79.

And see the same case, 11 Mees. & Wels., 315; 2 House of Lords' Cases, 579, 623.

In INSURANCE CO. *v.* SMITH, (3 Wharton, 521,) undisclosed principals were held liable for premiums of insurance upon merchandise in which they had an interest, but which was insured in the name of other parties, representing themselves as sole owners. "The underwriters," say the Court, "had a right to consider the persons who effected the insurance as standing in the relation in which they represented themselves. It was not their duty to inquire whether they were principals or agents, or whether any other person was interested in the insurance. It cannot now be an objection to the liability of the principals, that the Company put faith in the representation of their own agents."

We submit, therefore, that if the proceeds of this loan went to the use of the Bank, and the Defendant had no knowledge that Sherman was borrowing for the Bank, the Bank is liable, although the sole consideration on which the loan was made was Sherman's personal liability on his note.

It was important that the law on this subject should have been correctly stated to the jury. There was evidence that the intention, in regard to the application of this money, was changed at some period of the transaction. At first the intention appears to have been to purchase the English stock for the Bank. Afterwards Sherman concluded to buy it on his account. And if the jury believed that, when the money was loaned, Sherman was acting for the Bank, though without the knowledge of the Defendant, and afterwards applied it to the purchase of the stock for himself, they were at liberty to find a verdict for the Defendant, notwithstanding the Defendant gave credit exclusively to Sherman.

It is not necessary to consider under what circumstances the Bank would be liable, if the proceeds of the loan were not used for its benefit; for the instruction complained of is predicated upon the contrary hypothesis. Our point is, that the Court erred in saying, as it seems to have done, that if credit was given to Sherman alone, the Bank was not liable, though it received the benefit of the loan, unless the jury found that it was apprized of the fact that Sherman borbowed the the money on its behalf. It should have said that if the Bank received the money, and Sherman was acting as its agent in the transaction, without disclosing that fact, the Bank is liable, notwithstanding the loan was made solely on the credit of Sherman.

SIXTH.

The Court erred in refusing to grant the instruction reported in the 7th Bill of Exception.

The 8th assignment of error relates to the refusal of the court to give the instruction mentioned in this Bill of Exception. (Rec., pp. 13, 14.)

It is confidently submitted, (1) that the facts set out in the prayer disclosed a valid and binding compromise and settlement of the controversy referred to; (2) that those facts constituted in law a valid accord and satisfaction, exoneration and discharge, of the demand involved in this suit. And the court should have so instructed the jury.

First. The first question, then, is, was there a valid settlement of the pending difference, binding upon the Plaintiff's Bank?

(*a*) The facts recited in the prayer disclose a real claim on the part of the Defendant, and a substantial controversy to be adjusted and settled between the Banks.

Sherman had undoubted authority to borrow money for the use of the Bank. (Barnes *v.* Ontario Bank, 19 N. Y., 152; Sturgis *v.* Bank of Circleville, 11 Ohio, 153; Ballston Spa Bank *v.* Marine Bank, 16 Wis., 120.) And if he received this money on drafts drawn to his order, in his official capacity, and thus held himself out as acting for the

Bank, and the Defendant believed he was contracting for the Bank, the Bank was presumptively liable for the amount, and the Defendant was entitled to set off this debt against the demand of the Bank upon the Robinson check, and claim that there had been an equitable payment of that demand.

The reality of the claim of the Defendant thus conclusively appears. And as the Defendant had asserted its claim by returning the note and security received from Sherman, and insisting that the Plaintiff's Bank was bound to accept them in part payment of the demand it held against the Defendant, and had refused to receive the note and security when their return was tendered by the agent of the Merchants' Bank, the existence of a substantial difference between the parties also conclusively appears.

(*b*) It cannot be pretended that the corporation was without power to authorize the President to settle this controversy, or that an adjustment in fact made by him could not be the subject of ratification by the corporation. And it must be conceded that if the transaction of the President, in this case, was not *ultra vires*, the corporation would be bound by an express or an implied ratification of that transaction, supposing it to have been originally unauthorized by it.

Ordinarily, doubtless, the directorial power of a corporation cannot voluntarily release without consideration a debt owing to the corporation; but to hold that it cannot compromise or settle a real claim honestly made upon the corporation, and which, but for the compromise, would be brought to a legal decision, the result of which is doubtful, would be to deprive it of a necessary and proper power. If the claim is made in good faith, and the probable result of a suit is not certain, and it seems practically more advantageous to adjust it rather than incur the expense of litigation, it becomes the duty of the corporation to settle upon the most advantageous terms obtainable.

In *Baird* v. *Bank of Washington*, (11 Serg. & R., 411,) the power of the Directors to commute a debt was upheld.

In *Frankfort Bank* v. *Johnson*, (24 Me., 490,) the power also to compound and settle with a defaulting officer. And in *Lewis* v. *Eastern Bank*, (32 Me., 90,) to release an officer whose wrongful or erroneous act has caused a loss to the Bank which he is liable to reimburse, where there is reason to believe that the amount can only be recovered by suit against some other third party.

In *Stark Bank* v. *U. S. Pottery Co.*, (34 Verm., 146,) where the Treasurer of the defendant had executed in behalf of the Company a note for a private debt of one of its agents, the Court said the Corporation had power, under circumstances of necessity, to enter into such an obligation.

(*c*) The Bank having power to enter into the agreement made on its behalf by the President, it was capable of ratifying the act of the President if it was in fact unauthorized; and the facts recited in the Bill of Exception conclusively show that such ratification did occur.

If the Cashier or other officer of a Bank enter into a contract on behalf of a corporation without authority, and the Bank claim the benefit of the contract, it is thereby ratified by the corporation.

Medomak Bank *v.* Curtis, 11 Shep., 36.

Where a bill is indorsed by a corporation for the accommodation of another, and the indorsement is void, if the same is discounted by a party having no notice of the fact, and the proceeds are advanced *to* the corporation, the corporation is liable.

Bank of Genesee *v.* Patchin Bank, 13 N. Y., 316.

Although the authority of a cashier may not extend so far as to authorize him to alter the nature of a debt, or to change the relations of the Bank from a creditor to the agent of the debtor, yet if the Bank, with the knowledge of the facts, adopts or acquiesces in the acts done under such assumed agency, it cannot be heard afterwards to impeach them, under the pretense that they were done without authority, or contrary to instructions.

Bank of Penn. *v.* Reed, 1 Watts & Serg., 106.

If an officer of a corporation employ a person to perform services, and the corporation receive the benefit of them without objection, it is liable upon an implied assumpsit.

Hooker *v.* Eagle Bank, 30 N. Y., 86.

If a person assuming to act as the agent of a corporation, but without legal authority, makes a contract, and the corporation receive the benefit of it, and use the property acquired under it, such acts will ratify the contract and render the corporation liable.

Merchants' Bank *v.* Central Bank, 1 Kelley, 418.

In the case at bar the Bank adopted and ratified the agreement of Huyck, by accepting and paying the loan made by the Defendant, pursuant to the settlement effected by him, and by retaining the Sherman note and the English stock returned by the Defendant, and accepted by Huyck in payment of the present demand.

Directors are to be presumed to do their duty; and this being so, they are bound to repudiate an unlawful or unauthorized act of an officer; and if they do not, but solemnly acquiesce in the corporation receiving the benefit of the act, the company will be bound.

Robinson *v.* Bealle, 20 Ga., 276.

They will be regarded as sanctioning and adopting his acts on behalf of the Bank, and it will be affected as if they had been done under direction, or with the approval, cognizance, or collusion of the corporate government.

Bank Comm. *v.* Bank of Buffalo, 6 Paige, 497.

(*d*) But further: Independently of this implied ratification, the Merchants' Bank is bound by the settlement of the difference made by its President, upon the sound doctrine expounded by Mr. Justice Swayne, in the great case in this Court of THE MERCHANTS' BANK *v.* THE STATE BANK, (10 Wallace, 644:)

"Where a party deals with a corporation in good faith, the transaction is not *ultra vires*, and he is *unaware of any*

defect of authority or other irregularity on the part of those acting for the corporation, and there is nothing to excite suspicion of such defect or irregularity, the corporation is bound by the contract, although such defect or irregularity in fact exists. *If the contract be valid under any circumstances, an innocent party in such a case has a right to presame their existence, and the corporation is estopped to deny them.*

Corporations are liable for the acts of their servants while engaged in the business of their employment, in the same manner and to the same extent that individuals are liable under like circumstances."

The Defendant had "*a right to presume*" that the President of the Merchants' Bank had authority to settle and adjust the pending difference, and accept the securities in his hands in discharge of the demand; that he was acting by competent power of his Bank, and with its sanction; and having this right, the corporation is estopped to deny his authority as against the Defendant, an innocent party.

Other courts of great respectability have adopted the same doctrine.

The acts of officers of a Bank, within the scope of the general usage, practice, and course of business of such institutions, will bind the corporation in favor of third persons, who did not know that the officer was acting above and beyond the scope of his authority.

Lloyd *v.* West Branch Bank, 15 Penn., 174.

The Cashier of a Bank, as its executive officer, has authority to take such measures for the security and eventual collection of a debt as he deems proper, and to act in reference to the collection or *compromise* of the debt according to the general usage, practice, and course of business. And he may authorize another to so act, and the Bank will be bound thereby; especially if ratified, as it may be, by its subsequent acts and acquiscence.

Bridenbecker *v.* Lowell, 32 Barb., 17.

In this case the Court said, if the Bank did not intend

to be bound by the compromise, "*it should have dissented and given notice.*"

Where one transacts business or enters into an agreement with a Bank, and it was understood by the party at the time that he was in fact dealing with the Bank; if he acted upon this supposition in good faith; if the President had, from any source, power to bind the Bank in such a transaction, and especially if the Bank receives whatever benefit may accrue from it—then it cannot be doubted that the Bank could be held to perform whatever was undertaken on its behalf by its President.

Tremont Bank *v.* Paine, 28 Vt., 24.

Second. We contend that the facts recited in the Bill of Exceptions constituted in law a good accord and satisfaction of the demand now in controversy; that there was a clear agreement or accord, upon a sufficient consideration; and that the accord was executed by the acceptance of the Sherman note and the English stock and the execution of the contemporaneous agreement between the parties for a new loan. And we submit further, upon the principles and authorities just referred to, that the Bank must be held to have acquiesced in and ratified the agreement and acts of the President in this behalf, and estopped from denying the validity of them as against the Defendant.

The rule is well settled, that anything of legal value, whether a chose in possession or in action, *i. e.*, any legal interest or right which the creditor had not before, agreed to be received, and actually received in full satisfaction of the debt, is a good satisfaction, without regard to the comparative magnitude of the satisfaction with the original debt. If it be proved that it was *agreed* that this matter should be a satisfaction of the debt, this constitutes a valid accord and satisfaction; it being sufficient that there should be a promise, on valid consideration, to treat the debt as satisfied, and that this agreement be executed by the delivery of the consideration.

The delivery and acceptance in satisfaction of some col-

lateral thing, as the note or indorsement of a third person, even though the note be for a less sum than the original debt. (Booth *v.* Smith, 3 Wend., 66; Brooks *et al. v.* White, 2 Metcalf, 283;) or commodities, though confessedly of less value than the money due; or services rendered by the debtor; or an assignment of all the debtor's stock in trade and outstanding debts, (5 Johnson, 386;) or of specific real estate, or any chattel, (1 Dallas, 216;) or a smaller sum, before the day on which the original debt was due. And there is authority for saying that a liquidated demand founded on a bill or note, even though overdue, may be forgiven by word of mouth; and, *a fortiori*, such a demand may, with the consent of the creditor, be discharged by payment of a less sum than that secured by the note. (Foster *v.* Dawber, 6 Exch., 839.)

SEVENTH.

The court erred in refusing to give the instruction reported in the 8th Bill of Exception.

The Defendant asked the court to say that, if the jury found the facts recited in the prayer reported in this Bill of Exception, it was authorized "to accept and act upon the declarations of the President as the decision of the Bank touching the matter in difference; and if it in good faith so acted and accepted, believing the President, as the organ and financial head of the Bank, declared the decision of the Bank in relation to that matter, the Defendant is not chargeable with the amount paid by it with the note and certificate." (Rec. p. 15.) The refusal to so charge is the subject of the 9th assignment of error.

The question here raised is submitted upon the argument under the 8th assignment of error.

It is submitted, that under the cases there referred to of the *Merchants' Bank* v. *State Bank*, (10 Wall., 604,) and *Bridenbecker* v. *Lowell*, (32 Barb., 18,) the Bank is bound by the acts of Huyck in the premises.

In the latter case the Cashier of a Bank placed certain

notes held by the Bank in the hands of an indorser, to be used by him in obtaining indemnity from the maker; the indorser made an arrangement with the maker, by which property was transferred to him for the payment of the notes, and the notes were surrendered up to be cancelled. The court (Allen, J.,) said: "In the absence of evidence that the cashier was restricted in his authority, it will be assumed that the transmission of the notes to Etheridge, for the purpose mentioned, was within the scope of his authority. As between Gates (the maker) and the Bank, the latter was bound by the acts of Etheridge in respect to the notes transmitted, as well by reason of the authority necessarily and expressly conferred in view of the purpose for which the notes were sent, as by reason of the *apparent authority* with which the agent was clothed, and upon the faith of which Gates had a right to act.

But if the authority as originally conferred was not for any reason ample to bind the Bank to the extent of the damages of the agent, the acts of the latter were ratified by the subsequent acts and acquiescence of the principal. The Bank was advised of what had been done, and within a very few days received a part of the fruits of the arrangement, and has never repudiated the transaction or reclaimed the notes. If it did not intend to abide by the acts of Etheridge, it should have dissented and given notice within a reasonable time; and, not having done so, an assent to, or ratification of, the acts will be presumed."

EIGHTH.

The court erred in its refusal to give the instruction in the Defendant's 4th prayer, reported in the 10th Bill of Exception.

This is the foundation of the 10th assignment of error.

The Defendant having delivered to the Merchants' Bank the note of Sherman and the certificate of stock, and the note and certificate having been accepted and retained, no right of action arose against the Defendant until the note

and certificate were returned or tendered. The Merchants' Bank could not keep possession of the note and certificate, and at the same time sue the Defendant on the original debt.

Randlett *v.* Herron, 20 N. H., 102.
Chitty on Contracts, 385, 388, 389.
Masson *v.* Bovet, 1 Denio, 69.
Gloucester Bank *v.* Salem Bank, 17 Mass., 33.
U. S. Bank *v.* Bank of Georgia, 10 Wh., 351.
Thomas *v.* Todd, 6 Hill, 341.

But under no circumstances, it would seem, could the Plaintiff be entitled to recover more than the difference between the amount of the present demand and the value of the stock and note delivered to the Merchants' Bank, and retained in its possession. As the case now stands, the Plaintiff has a judgment for $20,000, *and* also two hundred shares of the stock of the Merchants' National Bank, with the note of Sherman, or the proceeds of those securities, if they have been disposed of; which, to say the least, is inequitable.

NINTH.

The Court erred in refusing to give the instruction asked in Defendant's 5th prayer, reported in the 10th Bill of Exception.

This refusal is the basis of the 11th assignment of error.

If the Merchants' National Bank had been in the habit of borrowing of the Defendant, through Sherman, its Cashier, and repaying the money, the defendant had a right to suppose that Sherman was acting in this transaction in his official capacity, and if the Defendant acted upon this supposition, the Bank is bound by the transaction.

The words of Lord Denman, in *Trueman* v. *Loder*, (11 A. & E., 589,) cover this proposition. In that case, it appeared, the defendant carried on business in London through one *H.*, who had no capital or credit, and was known to represent defendant. *H.* intended to make the

particular contract there involved on his own account, but plaintiff did not know this, and believed he represented the defendant as usual. Lord Denman said:

"Here is the case of one exclusively an agent for another, and in that light only regarded by the customer. Having full authority to so represent himself, he forms the design in his own mind to divert one of his numerous contracts from its expected destination to some purpose of his own. But that design cannot operate to oust the opposite party of those rights against the principal which both the agent and principal had by their conduct concurred in persuading him that he possessed. Suppose a landed proprietor to send his steward habitually to the neighboring fairs and markets, connected with the management of the estates; that the steward makes all these contracts in his own name, but that he is universally known to have no land of his own, and to be acting solely for his employer, by his direction, and on his credit, could his intention to make himself the owner of the articles bought on one particular occasion, in the course of the same dealing, deprive the vendor of his recourse against the master? Clearly not."

In the case of *Central Bank* v. *Empire Stone Dressing Co.*, (26 Barb., 35,) the Company was sued for a loan made in form to the President individually, who gave his own note for the amount with the Company's indorsement. There had been one previous similar transaction, in which the loan was made on the credit of the Company; and the company was held liable, on the ground that the plaintiff had a right to suppose the loan in question was for the benefit of the corporation.

TENTH.

The Court erred in refusing the instruction asked for in the 6th Prayer of Defendant, set forth in the 10th Bill of Exceptions.

This error (12th assignment) is sufficiently considered under the *Sixth* Point of this brief. It is submitted that the

agreement of the President to retain the Sherman note and the English stock as payment on the Robinson check, was a valid and binding accord and discharge of the present demand. (See authorities referred to *supra* in connection with 8th Assignment of Error.)

J. HUBLEY ASHTON,
W. D. DAVIDGE,
Of Counsel.

Supreme Court of United States.

DECEMBER TERM, 1872.

THE NATIONAL BANK OF THE METROPOLIS, *Plaintiff in Error,*	No. 37.
vs.	Error to the Supreme Court of the District of Columbia.
JAMES C. KENNEDY, *Receiver of the Merchants' National Bank.*	

Brief of Counsel for Defendant in Error.

This was an action of general *indebitatus assumpsit* brought by James C. Kennedy, Receiver of the Merchants' National Bank, to recover a balance of $20,000 due upon a check drawn by H. L. Robinson, Quartermaster, in favor of said Bank, upon the National Bank of the Metropolis; and issue was joined upon the pleas of non-assumpsit and never indebted. The evidence for the plaintiff, (Record, pp. 7, 8, and 9,) showed that Quartermaster Robinson deposited with the Merchants' National Bank his check for $50,000 on the National Bank of the Metropolis, which was immediately passed to his credit, and that on the same day, May 1, 1866, the check was presented for payment by the runner of the Bank, and the drawee's cashier delivered to the runner therefor some currency and sundry checks and sight drafts, and amongst others, a demand note of Charles S. Sherman,

for $20,000, dated February 27, 1866, payable to the order of the National Bank of the Metropolis, and *not endorsed*, by it, on which note was entered the following memorandum, "As collateral security, I deposit with "J. B. Hutchinson, Cashier, certificate No. 38, for 200 "shares stock Merchants' National Bank, to ensure "prompt payment of this obligation. (Signed,) C. A. "Sherman." And also, the certificate for said stock in the name of one Z. English, with a blank power of attorney to assign and transfer the same, signed by said English, and also a pencil memorandum of the defendant's cashier of the said several items as and for a payment of said check for $50,000. When brought by the runner to the Merchant's Bank, its teller refused to receive the said evidences of debt, and particularly the said individual note of Charles S. Sherman, and certificate of stock in satisfaction of said check, but handed them over to the cashier, who, the same afternoon, carried said evidences of debt all back to the National Bank of the Metropolis, and offered to return them to the assistant cashier, (the principal cashier being absent,) and demanded lawful currency in satisfaction of said $50,000 check. But the said assistant cashier refused to comply or to receive back said papers, alleging that the transaction in which said note of $20,000, and certificate of stock now passed to the National Bank, was a transaction of the Merchants' Bank, through said Sherman, as its cashier, whereas, in fact, the said note and transaction were not the note and transaction of the Bank, but were the individual note and transaction of Mr. Sherman; and the said Sherman then and there so stated, explained, and insisted with said assistant cashier, and explicitly put the refusal of the Bank to receive the said note and certificate of stock in part payment of said Robinson check, upon the ground, that said note and certificate were his own and not the Bank's, and that he

had never acted, or professed to act, nor been authorized to act as cashier or agent of the Bank, or in any way on its behalf in executing said note, and incurring the debt which it represented to the National Metropolitan Bank. Mr. Sherman then retained said papers until the next day, when he saw Mr. Hutchinson, the principal cashier, who, in turn, refused to take back said papers, and also insisted that said $20,000 represented a loan made to Sherman's Bank, and not to Sherman himself. Mr Sherman then deposited said note and other papers in the vaults of the Merchant's .Bank where they remained until the proclaimed failure of May 4, 1866, on the second day after said interview, and said papers afterwards passed into the custody of the plaintiff, as receiver. The plaintiff further proved that the said note of $20,000 was executed by said Sherman in his individual character, for his own individual benefit, under the following circumstances, (Record, p. 8.) On the morning of the 27th of February, 1866, Sherman informed Hutchinson, the cashier of the National Bank of the Metropolis, that he had a chance to purchase 200 shares of stock of the Merchants' Bank, and that he wanted a loan of $20,000 upon said stock, and that he could secure the dividend of $1,000, declared on the 9th of January preceding, by the purchase, and, thereupon, Hutchinson agreed to make him the loan, and not to call for the money until July following, and upon said agreement being made, he, Sherman, procured said certificate of stock from Leonard Huyck, the President of the Merchants' National Bank, who was the custodian of it on behalf of Mr. Z. English, the owner thereof, and the agent of Mr. English to sell the same, and then executed said twenty thousand dollar note and hypothecated said stock as security for the loan with the National Bank of the Metropolis, and received from its officers the proceeds of the loan in two drafts or checks which he deposited in the Merchants' Bank, to the credit

of Mr. English on the same 27th of February, and the amount thereof was subsequently checked out by English, and that on the same day, the dividend of $1,000 which had been secured to Sherman in his purchase from English, was credited to Sherman on the books of the Bank, (Record, pp. 11 and 12,) and that no part of said loan or its proceeds ever went to the credit of the Merchants' Bank, nor did said Merchants' Bank, in any way, derive benefit from said transaction. The plaintiff also proved that the said loan of $20,000 was entered in the books of the National Bank of the Metropolis in the name of Sherman, individually, and not as cashier, (Record, p. 12.) He then gave evidence of his appointment and qualifications as receiver of the Merchants' Bank.

The statement of evidence for the defendant below, made in brief of counsel for plaintiff in error, is not to be taken in this Court as any part of the record, for, upon inspection, it will be found that said supposed evidence as contained in printed record from page 18 to 26 inclusive has not been in any way incorporated into any bill of exceptions taken at the trial below, and within the rulings of this Court, in Thompson v. Riggs, 5 Wallace, p. 675, cannot be considered in passing upon the prayers and rulings below.

The first and second points made by plantiff in error, to wit: that judgment could not be recovered by the plaintiff unless the suit was authorized and directed by the comptroller, and that the suit should have been in the name of the Bank to the use of the receiver, are controlled by the rulings of this Court, in Kennedy v. Gibson, 8 Wallace, at page 506, as follows: "The receiver is the statutory assignee of the "association and the proper party to institute all suits. "They may be brought both at law and in equity, *in his* "*name*, or in the name of the association for his use." The language of the Court quoted in the brief of plain-

tiff in error, applies only to that special and peculiar right to sue the stockholders upon their individual liability under the 12th Section. That liability is contingent in fact, and contingent in degree or quantity, and of course both contingencies must have been ascertained, and the statute refers their ascertainment to the comptroller alone, without any power of revision by the Courts. Hence the necessity of action and direction by the comptroller in that class of cases before the receiver can sue; but in the case of external debtors to the association, their obligations are fixed and absolute from the beginning, and there is no necesity for intervention by the comptroller. The right and duty to sue arises at once from the duty imposed on the receiver by the 50th Section, "to collect all debts, dues and claims belonging to such association." An order in every case by the comptroller would be an useless, troublesome and interminable work of supererogation.

The third point of plaintiff in error (p. 9 of Record) being an objection to the parol proof of C. S. Sherman, explanatory of the reasons why the checks drawn by the National Bank of Metropolis for the amount of the $20,000 loan made to him, were drawn in his favor by the name of C. A. Sherman, Esq., cashier, instead of by the name of C. A. Sherman simply, cannot be sustained.

The instruments which the parol testimony was offered to explain, were not instruments to which the Merchants' Bank and the Bank of the Metropolis, were the immediate parties. So far as the Merchants' Bank was concerned they were instruments, between third persons; and the rule is universal, that third parties may, prove the truth however, contradictory to the written statements of others (Greenleaf, sec. 279,) and in an issue between parties claiming under, or defending against a written instrument, where a question of agency is involved parol proof is admitted to show that the party

designated therein was in truth, agent or principal. The case of Baldwin v. Bank of Newburg, 1st Wallace, 239, is directly to the point, that parol proof may be given to show, whether a person described in negotiable paper, as cashier, was dealing in the particular transaction as cashier or agent of the bank with which he was connected or was dealing in his individual right. And the case of the Mechanics' Bank v. Bank of Columbia, 5 Wheaton, 326, was one in which the very point was ruled, viz; that the declarations of the officers at the time of drawing the checks were admissible to, prove the character and purpose for which they were drawn.

In reply to the fourth point of plaintiff in error in which he groups his objections to the admissibility of the declaration of the agent of the vendor of the stock sold to Sherman; made at the time of the sale, of the name of the principal and the purpose and terms of the sale, as stated in second bill of exceptions, (p. 10,) with his objection to the statement of the purpose of the delivery to English, of the drafts received by witness from the Bank of the Metropolis as the proceeds of the loan made to him, and with his exceptions (p. 11,) to the testimony of Sherman as to the reason why the said drafts were not endorsed when first delivered to English, the defendant in error, submits that the first ruling is to be sustained upon the obvious ground that it was a necessary and indispensable part of the history of the transaction as it occured between the parties, and the declarations of Huyck the agent of English were part and parcel of res-gest, the verbal acts which went to make up the fact of sale of the stock between the parties thereto—and all that was said at the time became necessary to explain fully the dealing between the parties; and that, the more especially, as the line of defence in this case imputed in substance fraud and crime to

the witness and to the Merchants' Bank, and therefore the whole dealing of the actors in the transaction involved was proper to be disclosed to repel that imputation.

Instruction granted and refused.

Before considering the merits of the second prayer of the plaintiff in error, the attention of the Court is invited to the fact that the several bills of exception, from the 7th to the 10th inclusive, taken to the instructions granted and refused, contain no statement of evidence nor any reference to the evidence set out in the preceeding bills of exceptions; and that this Court cannot judicially know how far there was any evidence in the cause which would have justified the Court below in granting the prayers therein set forth, even assuming them to be law.

Moreover, so far as the facts necessary to support the prayers contained in the 7th and 8th bills of exceptions, (Rec. pp. 13 and 14,) are concerned, they are not even recited in any of the antecedent bills of exceptions, nor are they brought to the notice of this Court judicially in any mode, and that for want of any evidence, judicially appearing on the record to sustain them, the refusal of the Court below to grant them cannot be assigned for error here.

Thompson v. Riggs, 5 Wallace, 675.

But, assuming them to be properly here for review, it is submitted that, if by the instructions which were given, the whole law of the case was properly given to the jury, this Court will not reverse the judgment, because an instruction including in some other form part of the law of the case was refused.

Now, taking the first, second and third prayers of the plaintiff below, (as found on p. 12 of record,) and the

1st, 2d and 3d of defendant, pp. 15 and 16, and construing them all together, it will be found that the jury were instructed that if the loan of the 27th of February, 1866, of $20,000 was upon the personal credit of Charles S. Sherman, and upon his pledge of 200 shares of stock, and that the transaction was an individual transaction of said Sherman, and not made in behalf of the Merchants' Bank, and that the proceeds thereof did not go to the use or benefit of the Merchants' Bank, then the said note of $20,000, representing the amount of the loan, could not be lawfully insisted upon as part payment of the Robinson check, and that in that state of the case the President of the Merchants' Bank could not by his subsequent assent bind the Merchants' Bank to recognize it as part payment. But it in fact the loan of the 27th of February was made to the Merchants' Bank, represented by Sherman its cashier, no matter whether in the name of the Bank or in the name of Sherman individually, and no matter whether he represented the loan as his own or that of the Bank, the Bank would be responsible therefor, and that it was in any such case immaterial whether the proceeds of the loan were used in one way or another.

Now the criticism which is made by the counsel for the plaintiff in error, at pp. 18 and 19 of his printed brief upon the first prayer granted to the plaintiff below, is manifestly without foundation, because his second granted prayer, (p. 16 of Record,) explicitly instructs the jury that even if the lender did not know that Sherman was the agent of the Merchants' Bank, nay if it made the loan upon the emphatic statement of Sherman, that it was his own individual transaction, and the proceeds of the loan went to the benefit of the Merchants' Bank, its responsibility for that sum became fixed at the election of the lendor. The principles of law relied upon in support of the objections to the prayer are not con-

troverted. The question is simply as to the meaning of the Court, which the defendant in error submits is quite apparent by a comparison of all the instructions which were given.

7th and 8th bills of Exception and 6th Prayer of 10th bill of Exceptions.

The prayers embraced in these bills of exceptions are, in substance, the same. It has already been stated that this is no evidence judicially known to this record, relating to the principal facts stated as the foundation of the prayers, viz: the supposed conversations between the presidents of the Merchants' Bank and the cashier of the Bank of the Metropolis, the day after the, refusal of the Merchants' Bank to accept the $20,000 note.

Assuming, however, that the facts set out in the depositions of the plaintiff in error are before this Court, it appears from the depositions of the cashier, Hutchinson, (p. 23,) and of the assistant cashier, Frissel, (p. 26,) that no new loan was made at the interview with the president of the Merchants' Bank, described in said prayer, but on the contrary was declined by said Hutchinson. But were there evidence to support the prayers, the Court below was right in rejecting them, because they proceed upon the idea that although the loan was, in point of fact, not made on behalf of the Merchants' Bank, and although the Merchants' Bank derived no benefit from it—of which facts the lender had notice by the refusal of its proper officers to receive the note—that still a subsequent acquiescence by the president of the Merchants' Bank in a conversation with the cashier of the Bank of the Metropolis, operated as an adjustment, settlement and extinction of the demand of the Merchants' Bank. In the first place according to the hypothesis of the prayers themselves, there was no new consideration for such arrangement, and it was entirely nudum pactum, and

void. The Court will observe that the prayer does not state that the supposed new loan which acompained the stipulation was made in consideration thereof, but it distinctly states that the new loan of $10,000 was made upon new and distinct securities.

It therefore had nothing to do with the stipulation, which must rest on its own merits.

Now, if between parties competent to act, such a stipulation would be effective, what facts are stated in the prayer which show that the president had any authority from the bank to bind it in that way. The rule has been settled by this Court, that neither the president, nor cashier has any authority to bind a bank, except in discharge of their ordinary duties; 21 Howard, 364, United States v. Bank of Columbia, was a case where the cashier of a bank wrote to the Secretary of the Treasury that the bearer, one of its directors, was authorized to contract for the transfer of money from New York to New Orleans, and on the faith of the letter, money was entrusted to the party as the agent of the bank for transmission from New York to New Orleans. The Bank was held not responsible because the transaction was not within the scope of the cashier's power, nor authorized by the directors. Again, in 10 Wallace, 650, Merchants' Bank v. the State Bank the rule is stated to be that those dealing with a Bank in good faith have a right to presume integrity on the part of its officers, when acting within the apparent scope of their duties, and the Bank is bound accordingly. But in this case the matter was not only outside the apparent scope of his ordinary duties, but was a transaction which, in its nature, specifically warned the party to enquire into the authority of the officer.

The prayers were granted with a qualification, to the effect that such stipulation would bind the Merchants' Bank if the loan were authorized, or if the proceeds of the

loan went to the benefit of the Merchants' Bank, as part of its assets or property. This qualification seems to have been conceived in the very terms of the first resolution of this Court, in 10th Wallace, at 644, which resolution is in these words. "If the certificates "and gold actually went into the State Bank, then the "Bank was liable for money had and received whatever "may have been the defect in the authority of the "cashier to make the purchase, and this question should "have been submitted to the jury."

In the case at bar the question was submitted to the jury, with great distinctness and many times reiterated.

Defendant's 4th prayer, (record p. 17.)

The plaintiff below having presented the check for $50,000, for payment, and having notified the defendant of its refusal to accept the note and certificate of stock, had thereupon a complete right of action. The prayer assumes that the plaintiff had voluntarily acquired dominion and ownership over the note and certificate of stock, whereas the proof in the case is that the note was never endorsed by the Bank of the Metropolis, nor was the stock ever assigned to the Merchant's Bank, and those papers never were taken possession of by the Bank, but were simply deposited for safe keeping in its vaults after the teller had refused to accept them, and Sherman had offered to deliver them back to defendant, (see evidence, p. 7 of Record.) The plaintiff in error having of his own volition, placed the papers in the hands of the officers of the Bank against their consent, and having been notified of that fact, could acquire no right to insist upon a tender of the papers before the right of action against it could arise. Moreover, the form of an offer to return the papers, as defined in the last clause of the

prayer, would, in no event, be necessary. The cases quoted in brief of plaintiff in error have no application to the prayer. They are cases where parties sought to rescind contracts, on the ground of fraud, mistake, or failure of consideration in which it was held, that before suit, they must restore to the opposite party all benefit which they had derived under the rescinded contract. Here we do not seek to rescind a contract but simply to enforce an original liability which has never been discharged. The prayer was therefor properly refused.

Defendant's 5th prayer, (*Record p.* **17.**)

This prayer is clearly vicious. It asserts that if the Merchants' Bank had been accustomed to borrow money of the defendant through Sherman, its cashier, then no matter what the form of this loan or its attendant circumstances, (and they were superabundant to put the defendant upon enquiring as to the extent of Sherman's authority in the premises,) the simple fact that the defendant believed the Merchants' Bank to be the beneficiary of the loan, constitutes a right to demand that loan from the Merchants' Bank.

If the loan had been a loan in the ordinary course of bank busines, then the authorities quoted by the plaintiff in error might have application, but surely it is not necessary to argue on the evidence in this cause, that no court could have been justified in granting the prayer as framed.

Upon the whole case it is submitted that the judgment below ought to be affirmed.

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